Casco Northern Bank v. JBI Associates: Imputed Disqualification for Maine's Migratory Lawyer

Michael J. Canavan
University of Maine School of Law
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MAINE LAW REVIEW

CASCO NORTHERN BANK v. JBI ASSOCIATES: IMPUTED DISQUALIFICATION FOR MAINE'S MIGRATORY LAWYER

I. Introduction

The practice of law in Maine, as elsewhere in the United States, is changing. Problems that previously have been considered insignificant are more pronounced because of the increase in the number of practicing attorneys. One problem likely to be confronted by Maine lawyers on an increasing basis is that of determining the appropriateness of representing a party against a former client of the lawyer or the lawyer’s firm. This problem is complicated by today’s competitive job market for lawyers, which forces inexperienced lawyers to switch firms more frequently than in the past.

While it is a generally accepted axiom that a lawyer cannot represent a party in a similar matter adverse to the lawyer’s previous client, moving from firm to firm (or from a firm to a solo practice) raises a number of other questions regarding the transferring or “migratory” lawyer’s responsibilities. Can the lawyer represent interests adverse to the lawyer’s former firm’s clients if they were not the lawyer’s personal clients? Is the lawyer restricted from opposing clients of the former firm even if the lawyer can show that he obtained no information relating to the former client while the lawyer worked at the old firm? If the lawyer is prohibited from representation, are all of the lawyer’s new colleagues similarly disqualified? Courts throughout the United States have been struggling to find the “right” answers to these questions for some time. Indeed, since

1. The employment level for lawyers in Maine rose by 66.7% between 1981 and 1987 and has continued to increase throughout the 1990s. MAINE DEPARTMENT OF LABOR, LEGAL SERVICES 11, 19 (1990). This growth has paralleled national growth in the legal services industry. See U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1994 407, 410 (114th ed. 1994).
4. See ME. BAR R. 3.4(d)(1); Kevlik v. Goldstein, 724 F.2d 844, 850 (1st Cir. 1984) (“The principle is well established that an attorney should be disqualified from opposing a former client if during his representation of that client he obtained information ‘relevant to the controversy at hand.’ ” (quoting United States v. Ostrer, 397 F.2d 337, 340 (2d Cir. 1970))); Analytica, Inc. v. NPD Research, Inc. 708 F.2d 1263, 1269 (7th Cir. 1983) (“For a law firm to represent one client today, and the client’s adversary tomorrow in a closely related matter, creates an unsavory appearance of conflict of interest . . . .”).
the mid-1950s numerous cases and commentaries have addressed both the policies that underlie certain prohibitions of successive representation and the rules that should guide an attorney's conduct in such situations.

Only in the last several years, however, has Maine's highest court been faced with the challenge of determining when a lawyer should be disqualified from representing a client against a party with whom the lawyer has a previous connection. Most recently, in *Casco Northern Bank v. JBI Associates*, the Maine Supreme Judicial Court, sitting as the Law Court, unanimously upheld a trial judge's disqualification of two attorneys who were seeking to represent a business entity in a suit against the entity's former affiliates. The court held that due to the nature of the lawyers' connection to the previous work done on behalf of all of the parties, the lawyers were now barred from representing one party against the others. The Law Court prohibited the first attorney from representing JBI Associates against its former affiliates in a lease dispute because the attorney had participated in the creation of JBI Associates and an affiliated company that, the court held, was substantially related to the present matter. The second lawyer was disqualified because

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8. 667 A.2d 856.

9. *Id.* at 861.

10. *Id.* at 860-61.

11. *Id.*
he previously had been associated with the first lawyer and so was presumed to have received the same confidential information.\textsuperscript{12}

When determining whether a lawyer's current representation is adverse to a prior representation most courts have utilized the "substantial relationship" test.\textsuperscript{13} There is much less agreement regarding when the possession of confidential information should be imputed to the attorney's former or present colleagues. Part II of this Note will examine several approaches that courts have taken in ruling on "imputed" or "vicarious" disqualification motions. It then will explain how Maine's treatment of imputed disqualification follows or differs from other approaches. Part III will discuss the facts of \textit{JBI Associates} and describe the Law Court's reasoning in upholding the disqualifications. Finally, Part IV will explain the possible ramifications of the Law Court's decision and suggest how its negative consequences may be avoided.

II. Background

A. The Substantial Relationship Test

Before any disqualification can be imputed, there must be a lawyer who is ineligible based on individualized grounds. One basis for disqualification, the basis considered in \textit{JBI Associates}, is the prohibition on subsequent adverse representation. The rule that lawyers may not represent clients in related matters to the detriment of their former client is derived from an attorney's duty of loyalty to the client.\textsuperscript{14} "For lawyers, the conflict of interest prohibitions flowing from general agency law are enhanced by the special fiduciary relationship between lawyers and clients. Any influence that might interfere with a lawyer's devotion to a client's welfare potentially constitutes a conflict with that client's interest."\textsuperscript{15}

\begin{itemize}
  \item \textsuperscript{12} \textit{Id.} at 861.
  \item \textsuperscript{13} \textit{See infra} part II.A.
  \item \textsuperscript{14} Casco N. Bank v. JBI Assocs., 667 A.2d at 860. \textit{See also} T.C. Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265, 268 (S.D.N.Y. 1953) ("A lawyer's duty of absolute loyalty to his client's interests does not end with his retainer."); \textit{In re Corn Derivatives Antitrust Litig.}, 748 F.2d 157 (3d Cir. 1984), \textit{cert. denied}, 472 U.S. 1008 (1985): The duty of loyalty does not always detach when the representation ends. A client has an expectation that the attorney will diligently pursue his goals until the matter is completely resolved, absent an effective waiver. In litigation, an attorney may not abandon his client and take an adverse position in the same case. This is not merely a matter of revealing or using the client's confidences and secrets, but of a duty of continuing loyalty to the client.
  \item \textsuperscript{15} \textit{Restatement (Third) of the Law Governing Lawyers} ch. 8 introductory note (Tentative Draft No. 4, 1991).
\end{itemize}
Although the prohibition of subsequent adverse representation finds its origin in the law of fiduciary duty and the attorney's status as an agent,\(^\text{16}\) the primary test used by courts in determining when the prohibition applies is found in Judge Weinfeld's seminal opinion, \textit{T. C. Theatre Corp. v. Warner Bros. Pictures}.\(^\text{17}\) Judge Weinfeld's "substantial relationship" test states that:

[W]here any substantial relationship can be shown between the subject matter of a former representation and that of a subsequent adverse representation, the latter will be prohibited. . . .

. . . . [T]he former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client. The Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation.\(^\text{18}\)

The American Bar Association's (ABA) Model Code of Professional Responsibility\(^\text{19}\) contains no direct prohibition on successive adverse representation, but disqualification under the Code is often considered under Canon 9, providing that "[a] lawyer should avoid even the appearance of impropriety,"\(^\text{20}\) and Canon 4, stating that "[a] lawyer should preserve the confidences and secrets of a client."\(^\text{21}\)

\(^{16}\) See \textit{Restatement (Second) of Agency} §§ 395, 396 (1957).

\(^{17}\) 113 F. Supp. 265 (S.D.N.Y. 1953).

\(^{18}\) Id. at 268.

\(^{19}\) The Model Code of Professional Responsibility and the Model Rules of Professional Conduct are standards set forth by the ABA as guidance for attorney conduct. The Model Code, consisting of Canons, Ethical Considerations and Disciplinary Rules, was promulgated in 1969. The Model Rules followed in 1983 and were intended to "clarify the profession's ethical responsibilities in light of changed conditions" since the Model Code's adoption. \textit{Model Rules of Professional Conduct} chairperson's introduction (1994). As of 1994, forty-three out of fifty-one jurisdictions (the states plus the District of Columbia) had adopted some version of either the Model Code or Model Rules. \textit{ABA/BNA Lawyers' Manual on Professional Conduct} § 01:3-4 (1994). Maine initially patterned its own disciplinary rules after the Model Code. See Me. Rptr., 396-400 A.2d LXXI-LXXV. In 1993 Maine revised its conflict of interest provisions, and in doing so, drew inspiration from both the Model Rules and Tentative Draft No. 4 of the \textit{Restatement of the Law Governing Lawyers}. Maine developed its own rule in several areas, however, including imputed disqualification. Me. Rptr., 602-617 A.2d CXXIX.

\(^{20}\) \textit{Model Code of Professional Responsibility} Canon 9 (1980).

\(^{21}\) Id. Canon 4. See also id. n.7 ("[A]n attorney must not accept professional employment against a client or a former client which will, or even may require him to use confidential information obtained by the attorney in the course of his professional relations with such client regarding the subject matter of the employment."
The ABA Model Rules of Professional Conduct address conflicts of interest regarding former clients in a more direct manner than the Model Code. Model Rule 1.9(a) incorporates Judge Weinfeld's "substantially related" test and states: "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation."22

Maine prohibits subsequent adverse representation under Bar Rule 3.4(d).23 Maine's rule goes further than the Model Rules do by prohibiting representation if any confidential information obtained during the former representation may be used in the subsequent representation, even if the matters are not related. In Adam v. Macdonald Page & Co.,24 the Law Court adopted the Seventh Circuit's three-step test for determining whether there is a substantial relationship between prior and present representation:

Initially, the trial judge must make a factual reconstruction of the scope of the prior legal representation. Second, it must be determined whether it is reasonable to infer that the confidential information allegedly given would have been to a lawyer representing a client in those matters. Finally, it must be determined whether that information is relevant to the issues raised in the litigation pending against the former client.25

Prior to Macdonald Page, Maine's successive representation rule was applied by the Bankruptcy Court for the District of Maine in In re Ferrante.26 In In re Ferrante, the bankruptcy court recognized the two-pronged approach to disqualification under Maine's successive representation rule,27 and found that while the matter under litigation was not substantially related to a previous representation of

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22. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9(a) (1994).
23. Maine Bar Rule 3.4(d)(1)(i) states:
(d) Conflict of Interest: Successive Representation.
   (1) Interests of Former Clients.
      (i) Except as permitted by this rule, a lawyer shall not commence representation adverse to a former client without that client's informed written consent if such new representation is substantially related to the subject matter of the former representation or may involve the use of confidential information obtained through such former representation.

ME. BAR R. 3.4(d)(1)(i).
24. 644 A.2d 461 (Me. 1994).
25. Id. at 463 (quoting In re Schraiber, 103 B.R. 1001, 1003 (Bankr. N.D. Ill. 1989) (quoting Novo Terapeutisk Lab. A/S v. Baxter Travenol Lab., 607 F.2d 186, 195 (7th Cir. 1979) (en banc))).
27. Id. at 645.
Ferrante by his present opponent's lawyer, there was a likelihood that confidential information had been provided to the lawyer. Disqualification was not allowed, however, as the court found that Ferrante had waived any objection to representation by "exhibiting a thorough, knowing and continuing acceptance of [the opposing lawyer's] representation of [his opponent] against him."

Jurisdictions that have adopted the Model Rules do not automatically disqualify a lawyer in possession of confidential information as does Maine, but subject the lawyer to other rules restricting the use of such confidential information.

B. Imputed Disqualification

1. In General

The rules that govern lawyer disqualification are sometimes extended to the lawyers within the firm of the disqualified lawyer. This concept is termed "imputed disqualification." Imputing conflicts of interest to affiliated lawyers stems from three concerns:

First, [affiliated] lawyers . . . ordinarily share a common interest in each other's welfare. . . . If a lawyer's relationship with a client might create an incentive for the lawyer to violate an obligation to another client, an affiliated lawyer will often have the same or a similar incentive to favor one client over the other. Second, [affiliated] lawyers . . . ordinarily have access to files and other confidential information about each other's clients. . . . Accidental or purposeful sharing of confidential client information among affiliated lawyers may compromise the representation of that or another client. Third, a client who is concerned about an abuse of confidential information or other form of disloyalty by the primarily disqualified lawyer often possesses no adequate means of proving that disloyalty has occurred because of the actions of an affiliated lawyer. . . . If a complaining client were required to demonstrate that the lawyer misused confidential information, the client often would be forced to reveal the very information whose confidentiality the client seeks to protect.

Courts have not been uniform, however, in their treatment of attorneys who change jobs and move to other firms. Generally, courts

28. Id. at 646.
29. Id. at 648.
30. Id. at 649.
31. See Model Rules of Professional Conduct Rules 1.6(a), 1.9(c) (1994) (general prohibitions on the use of confidential information relating to representation to the detriment of a present or former client).
impose two presumptions. First, courts presume that an attorney leaving a firm has obtained confidential information regarding that firm's clients.\(^{34}\) Second, they presume that the attorney will share those confidences with the attorney's new firm.\(^{35}\) Courts, however, take different views on whether these presumptions are rebuttable. Many courts allow the first presumption to be rebutted.\(^{36}\) Thus, a lawyer hired to oppose a client of the lawyer's former firm may avoid disqualification by making a showing that the lawyer was not privy to any confidential information of that client while at the former firm.\(^{37}\)

Courts may be less likely to allow rebuttal of the second presumption.\(^{38}\) An irrebuttable presumption is justified by the assumption that a lawyer with confidential information will disclose that information to new colleagues if it will help them.\(^{39}\) Some courts do al-

\(^{34}\) Schiessle v. Stephens, 717 F.2d 417, 420 n.2 (7th Cir. 1983). See Morgan, supra note 6, at 47 ("Traditionally, what one agent of a firm knows, all members of the firm are presumed to know.").

\(^{35}\) Cromley v. Board of Educ., 17 F.3d 1059, 1065 (7th Cir.), cert. denied, 115 S. Ct. 74 (1994). See Liebman, supra note 6, at 1000 ("The guiding rationale [of imputing conflicts of interest] is obviously one of avoiding even an appearance of impropriety, the fear being that the lawyer could have revealed previously acquired confidences to his new partners and associates, inadvertently or otherwise. In fact, there is a presumption that he did so.").


\(^{37}\) See Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d at 753-54; It is unquestionably true that in the course of their work at large law firms, associates are entrusted with the confidences of some of their clients. But it would be absurd to conclude that immediately upon their entry on duty they become the recipients of knowledge as to the names of all the firm's clients, the contents of all files relating to such clients, and all confidential disclosures by client officers or employees to any lawyer in the firm.

\(^{38}\) NCK Org. v. Bregman, 542 F.2d 128, 134-35 (2d Cir. 1976); State ex rel. First National Bank v. Buckley, 503 N.W.2d 838, 844 (Neb. 1993). But see LaSalle Nat'l Bank v. County of Lake, 703 F.2d 252, 257 (7th Cir. 1983) (allowing rebuttal of presumption that confidential information was shared with new firm); Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d at 754 (allowing rebuttal of presumption that confidential information was shared with new firm).

\(^{39}\) See Harvard Note, supra note 6: From the moment an attorney has reason to expect that he will represent a client in a matter to which the confidences and secrets of one of his present affiliate's former clients may be relevant, he has a significant incentive... to elicit such information deliberately from his colleague. Although the fellow lawyer need not knowingly cooperate in the sharing of information (seemingly innocuous questioning or casual examination of relevant files will suffice), he may have appreciable incentive and opportunity to do so. The fact of affiliation alone is generally enough to guarantee that there will be economic, sentimental, and hegemonic ties between the associated lawyers sufficient to induce an affiliate's cooperation with his colleague. Although such ties might exist even between former affiliates, the
low this presumption to be rebutted by a showing of institutional safeguards such as "screening" the "infected" lawyer from colleagues working on the related case.\textsuperscript{40} The Model Code of Professional Responsibility advises that "[i]f a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment."\textsuperscript{41} The Model Rules of Professional Conduct similarly command that "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by [other conflicts rules]."\textsuperscript{42}

2. Imputed Disqualification in Maine

The Law Court's decision in \textit{JBI Associates} was its first ruling on imputed disqualification. In fact, the court first addressed successive conflict of interest issues only a year earlier in \textit{Adam v. Macdonald Page & Co.}\textsuperscript{43} Maine's imputed disqualification rule, adopted in 1993,\textsuperscript{44} advises when a lawyer's "taint" that prohibits the lawyer probability that an attorney will feel free to request his affiliate's \textit{sub rosa} assistance and that the affiliate will oblige is plainly greater when the lawyers are presently affiliated. It is this risk of deliberate sharing, customarily disregarded in the case of former affiliates, that is the distinctive danger of present affiliation.\textsuperscript{45}

\textit{Id.} at 1361-62 (footnotes omitted).

\textsuperscript{40} See, e.g., Cromley v. Board of Educ., 17 F.3d 1059, 1065 (7th Cir. 1994) (approving the use of mechanisms that protect the confidentiality of the attorney-client relationship, including instructing members of the new firm of a ban on exchange of information with the "infected" attorney, prohibiting access to files and other case information, locking case files with limited key distribution, installing secret codes to access information stored on electronic hardware, and prohibiting the sharing of fees derived from the litigation), \textit{cert. denied}, 115 S. Ct. 74 (1994).

\textsuperscript{41} \textit{MODEL CODE OF PROFESSIONAL RESPONSIBILITY} DR 5-105(D) (1980). The Model Code and Maine's original conflict of interest disciplinary rules used the term "employment" to refer to the attorney-client relationship. Both the Model Rules and Maine's revised conflict of interest provisions substituted "representation" for "employment" to make clear that the provisions apply during any "performance of professional services as a lawyer for a person or entity toward whom the obligations of lawyer to client are owed." \textit{Me. Rptr.}, 602-617 A.2d CXXX.

\textsuperscript{42} \textit{MODEL RULES OF PROFESSIONAL CONDUCT} Rule 1.10(a) (1994).

\textsuperscript{43} 644 A.2d 461 (Me. 1994).

\textsuperscript{44} In 1993 Maine revised Bar Rule 3.4 governing conflicts of interest. Prior to the changes, Rule 3.4 was patterned after the Model Code conflict provisions. The goal of the revision was to "simplify and clarify ... the abstract language of the Maine conflict rule [which] frequently made its application to real cases difficult." \textit{Me. Rptr.}, 602-617 A.2d CXXVII-CXXIX. Maine's imputed disqualification rule was not changed substantially, however. Prior to the 1993 revision the general rule was:

\textbf{3.4(k) Partners and Associates Barred; Exceptions.} If, for reasons other than health, a lawyer is required to decline employment or to withdraw from employment under these rules, no partner or associate, and no lawyer
from representing a client should be attributed to other lawyers:
"[I]f a lawyer is required to decline or withdraw from representation under these rules for reasons other than health, no partner or associate, and no lawyer affiliated with the lawyer or the lawyer's firm, may commence or continue such representation." The manner in which the trial court applied Rule 3.4(b)(3)(i) to disqualify an attorney was a central issue in JBI Associates.

III. THE JBI ASSOCIATES DECISION

A. The Factual Background

Community Care Systems, Inc. (CCSI), a developer of healthcare facilities, engaged Csaplar & Bok, a Boston law firm, as its corporate counsel in 1978. In 1979 CCSI recognized the business potential of building facilities in New Hampshire and Maine. Specifically, CCSI was interested in developing a psychiatric facility in South Portland, Maine. Frederick Goldstein, a partner at Csaplar & Bok and head of its tax department, advised CCSI and CCSI's president, Frederick Thacher, in a letter of September 26, 1979, regarding development of the hospital while minimizing the company's tax and legal consequences. Goldstein suggested that CCSI create two new business entities: a limited partnership to procure the land and build the hospital facility and a corporate subsidiary to operate the facility. Following Goldstein's advice, CCSI formed JBI Associates Limited Partnership (Associates) and Jackson Brook Institute, Inc. (JBI).

During May of 1983, in a series of concurrent transactions prior to construction of the facility, Casco Northern Bank agreed to finance the construction of the facility for Associates, and Associates leased the facility to JBI. CCSI agreed to act as guarantor for JBI's obli-
gations to Associates under the lease.\textsuperscript{54} Associates then assigned the lease and the guaranty to Casco Northern Bank as assurance for the loan.\textsuperscript{55} Thacher was the signatory on all of these documents, as President of CCSI, Associates, and JBI.\textsuperscript{56} While it is unclear what role Goldstein played in these 1983 transactions,\textsuperscript{57} Csaplar & Bok as a firm represented all three entities during this time.\textsuperscript{58}

At about the same time that these transactions were occurring, Leonard Singer joined Csaplar & Bok as an associate.\textsuperscript{59} There is no indication in the record that Singer did any legal work for CCSI or its affiliates during his tenure at Csaplar & Bok.

A number of changes affecting the relationships between the parties took place during the mid-1980s. In 1985 CCSI sold its partnership interest in Associates, ending the affiliation between the two entities.\textsuperscript{60} Also in the mid-1980s Csaplar & Bok ended its representation of CCSI.\textsuperscript{61} In 1990 Csaplar & Bok merged into another Boston law firm. During that same year, but prior to the merger, both Goldstein and Singer ended their affiliation with Csaplar & Bok and joined separate firms.\textsuperscript{62}

In 1990 a dispute arose between Associates and JBI regarding the lease agreement.\textsuperscript{63} Goldstein was involved in resolving this dispute throughout 1990 and 1991, but the parties again disputed the characterization of his involvement.\textsuperscript{64} CCSI claimed that Goldstein acted as a mediator who sought to represent the interests of Associates, CCSI, and JBI.\textsuperscript{65} Associates maintained that Goldstein was hired by Associates to act solely as its representative in the lease dispute proceedings.\textsuperscript{66}

Casco Northern Bank filed suit against Associates, CCSI, and JBI in November of 1993, alleging that JBI was "upstreaming" funds to its parent company, CCSI, in violation of the loan and lease agree-

\textsuperscript{54} Casco N. Bank v. JBI Assocs., 667 A.2d at 858.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} Associates claimed that Goldstein had no involvement with CCSI or its affiliates other than his initial letter of advice and played no role in the subsequent lease arrangement between the parties. Brief of Appellant at 11, Casco N. Bank v. JBI Assocs., 667 A.2d 856 (Me. 1995) (No. CUM-95-149). JBI and CCSI contended, however, that Goldstein "was in fact the author of very the [sic] lease at issue" in the case. Brief of Appellee at 4.
\textsuperscript{58} Casco N. Bank v. JBI Assocs., 667 A.2d at 858.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} Brief of Appellant at 3, n.5, Casco N. Bank v. JBI Assocs., 667 A.2d 856 (Me. 1995) (No. CUM-95-149).
\textsuperscript{63} Casco N. Bank v. JBI Assocs., 667 A.2d at 858.
\textsuperscript{64} Id.
\textsuperscript{65} Id.
\textsuperscript{66} Id.
ments. The bank feared that JBI's actions would put the facility at risk of defaulting on its obligations to Associates under the lease, which in turn would cause Associates to default on the loan. Casco Northern Bank sought a declaratory judgment that JBI was prohibited from diverting funds to CCSI without Casco's prior written approval or, in the alternative, a reformation of the loan documentation. Associates, acting through Goldstein and Singer, cross-claimed against CCSI and JBI in March of 1994.

In April of 1994, JBI requested that Goldstein and Singer withdraw from representing Associates because of their prior related representation of CCSI. When the attorneys failed to respond, JBI filed a motion to disqualify Goldstein and Singer on the ground that they previously represented CCSI and JBI in connection with the lease at issue in the underlying suit.

B. The Trial Court Decision

The superior court granted JBI's motion and ordered Goldstein and Singer disqualified from representation of Associates in the pending lawsuit. The court based this decision on the affidavits of Thacher, Goldstein, and Singer, as well as affidavits from other interested individuals, and written and oral arguments. The court, after reciting and explaining the two prongs of Maine's rule prohibiting successive conflicts of interest, stated that it would apply the three-step analysis adopted by the Law Court in *Macdonald Page* to determine whether the prior representation was substantially related to the matters at issue in the pending litigation.

67. Brief of Appellant at 3-4. Casco N. Bank v. JBI Assocs., 667 A.2d 856 (Me. 1995) (No. CUM-95-149). “Upstreaming” literally refers to the process of transferring funds from a subsidiary to its parent company. In this case Casco Northern Bank alleged that under the lease and loan agreements entered into in 1983, JBI was prohibited from upstreaming funds to CCSI without first getting approval from the bank, thereby ensuring the bank that JBI would retain sufficient reserves to pay the mortgage loan. JBI and CCSI contended that so long as the loan installments were paid on a timely basis, Casco Northern Bank had no right to examine the companies’ finances. See generally Record of Casco N. Bank v. JBI Assocs., on file with Cumberland County Courthouse, Portland, Maine.

68. See Brief of Appellant at 4.

69. Id.

70. Casco N. Bank v. JBI Assocs., 667 A.2d at 858.

71. Id.


74. Id. at 3-4.

75. Id. at 4.

76. See supra notes 24-25 and accompanying text.

77. Casco N. Bank v. JBI Assocs., CV-93-1253, at 4-5. In a curious coincidence, the trial judge in *JBI Associates* was the same judge assigned to the *Macdonald Page*
found “that the involvement of Goldstein in the creation of the psychiatric hospital by CCSI, JBI and Associates was substantially related to the matters now pending in this litigation,”\textsuperscript{78} even though he did not participate in the closing of the lease and regardless of his role in drafting or negotiating the lease or loan documents.\textsuperscript{79} The court was not persuaded by Associates’s contention that CCSI and JBI had waived their right to object to Goldstein’s representation of Associates.\textsuperscript{80} Associates argued that because Goldstein represented Associates in the negotiations with CCSI and JBI in 1990 and 1991 without objection, CCSI and JBI had waived any conflict of interest objection.\textsuperscript{81} The court subsequently disqualified Singer under Maine’s imputed disqualification rule, holding that “if Goldstein is disqualified then any other attorney who was a member of the firm at the time would also be disqualified.”\textsuperscript{82} Associates appealed the decision to the Law Court.\textsuperscript{83}

\section*{C. The Law Court Decision}

On appeal, Associates challenged Goldstein’s disqualification on a number of grounds. Associates first argued that the trial court’s finding that Goldstein’s previous representation of CCSI was substantially related to the pending litigation was clearly erroneous.\textsuperscript{84} The Law Court agreed that the “clearly erroneous” standard was applicable in reviewing orders granting or denying disqualification
of counsel, reasoning that the trial court’s “intimate knowledge of the case helps it to determine not only if the issues are ‘substantially related,’ but also assists it in detecting any abuse of the ethical rules.”\textsuperscript{85} The Law Court then reiterated its interpretation of the rule against successive representation established in \textit{Macdonald Page}.\textsuperscript{86} The court held that “[t]here was ample evidence for the [trial] court to conclude that the work performed by Goldstein in setting up the two smaller entities, and devising the lease-back plan, was substantially related to the parties’ respective duties under the lease and loan agreements.”\textsuperscript{87} The Law Court found “no error in the trial court’s conclusion that the prior representation was substantially related to the pending litigation.”\textsuperscript{88}

Associates next requested the Law Court to vacate the trial court’s finding that CCSI and JBI had not waived their objection to Goldstein’s representation of Associates.\textsuperscript{89} Associates argued that because the trial court did not set forth the bases for its waiver decision, no deference to its finding was required.\textsuperscript{90} Associates urged the court to follow other jurisdictions in ruling “that (1) if a client becomes aware that his former attorney is now representing his adversary and (2) if the former client delays in objecting to that representation, the client shall be deemed to have waived the right to object.”\textsuperscript{91}

The Law Court again applied a deferential standard in reviewing the trial court’s waiver holding.\textsuperscript{92} It held that since there was a dispute over Goldstein’s role during the negotiations between the parties in 1990 and 1991, “[t]here was sufficient competent evidence presented to the court to permit a finding that CCSI and JBI were unaware of Goldstein’s adverse representation until March of 1994 and that therefore there was no waiver of that client’s right to object.”\textsuperscript{93} The court therefore did not reject Associates’ proffered rule regarding waiver; it merely upheld the trial court’s finding that CCSI and JBI had not waived their objection to Goldstein’s representation.\textsuperscript{94}

Additionally, Associates asserted that even if Goldstein’s previous representation was substantially related to the current litigation, CCSI and JBI could have no expectation of confidentiality in the

\textsuperscript{85} Casco N. Bank v. JBI Assocs., 667 A.2d at 859.
\textsuperscript{86} Id. at 860. \textit{See supra} notes 24-25 and accompanying text.
\textsuperscript{87} Id.
\textsuperscript{88} Id.
\textsuperscript{89} Brief of Appellant at 14, Casco N. Bank v. JBI Assocs., 667 A.2d 856 (Me. 1995) (No. CUM-95-149).
\textsuperscript{90} Id. at 14-20.
\textsuperscript{91} Id. at 15.
\textsuperscript{92} Casco N. Bank v. JBI Assocs., 667 A.2d at 861.
\textsuperscript{93} Id.
\textsuperscript{94} Id.
information learned during that representation. Associates relied on Allegaert v. Perot, in which the Second Circuit Court of Appeals concluded that in cases involving joint representation, a former client could not expect that its lawyers would withhold confidences from its co-clients.

The Law Court refused to adopt the Allegaert rule, finding it too narrow to address all of the concerns embodied in Maine Bar Rule 3.4(d)(1)(i):

[T]he rule against subsequent adverse representation goes beyond simply protecting attorney-client communications. The rule addresses the reasonable expectations of the average client that his attorney, who is both counsellor and confidante, will remain loyal. The rule protects the integrity of the judicial system and the public's view of the legal profession; it is necessary to counteract the perception of attorneys as simply "hired guns," who can and do change sides at will, subject only to the highest bidder.

Associates addressed Singer's disqualification by asserting that the trial court misapplied the Maine rule of imputed disqualification. Associates argued that the court's holding that "if Goldstein is disqualified then any other attorney who was a member of the firm at the time would also be disqualified" adds a temporal element not present in Maine's rule. Associates requested the Law Court to interpret Rule 3.4(b)(3)(i) to allow an attorney with no present, direct affiliation with a disqualified lawyer to rebut any presumption that client confidences were shared during a previous affiliation.

The Law Court rejected Associates' proposed interpretation of the imputed disqualification rule. It held that “[t]here is no room in [the rule's] language allowing Singer to rebut a presumption that he was privy to privileged, confidential information.” The court added that even if Singer were allowed an opportunity to rebut the presumption, his disqualification would be required for the reasons supporting the rule against successive representation: “[A] client’s expectations of loyalty, public perception of the legal profession, and preservation of the integrity of the judiciary.”

95. Brief of Appellant at 20.
96. 565 F.2d 246 (2d Cir. 1977).
97. Id. at 250.
101. Brief of Appellant at 23.
103. Id.
104. Id.
The primary focus of the *JBI Associates* decision was the disqualification of Frederick Goldstein, not that of Leonard Singer.\(^{105}\) The attention given to Goldstein’s involvement in this case was natural given his admitted participation in the prior legal affairs of the parties. In affirming Goldstein’s disqualification the Law Court deferred to the trial court’s judgment that “[t]here was ample evidence . . . to conclude that the work performed by Goldstein in setting up the two smaller entities, and devising the lease-back plan, was substantially related to the parties’ respective duties under the lease and loan agreements” that were the subject of the subsequent dispute.\(^{106}\)

The disqualification of Goldstein under Maine Bar Rule 3.4(d)(1)(i) was not factually unreasonable. Although the details of Goldstein’s role in Csaplar & Bok’s representation of CCSI and its affiliates were disputed, the trial court reviewed all of the CCSI documents with which Goldstein concededly had involvement, the loan and lease documents at issue, and affidavits from the parties, in addition to conducting oral argument. Given that the determination of whether a substantial relationship exists between a current and prior representation is a factual question,\(^{107}\) the trial judge had sufficient information to make a well-reasoned finding, a finding that the Law Court did not quarrel with under the clearly erroneous standard of review.\(^{108}\)

\(^{105}\) Only two paragraphs of the six-page decision were allotted to analysis of Singer’s disqualification.

\(^{106}\) Casco N. Bank v. JBI Assocs., 667 A.2d at 860.

\(^{107}\) *Id.* at 859. There is some division among jurisdictions as to the standard of review applicable to orders on disqualification motions. A majority of courts have adopted the highly deferential “abuse of discretion” standard, reasoning that since the lower courts have the power and responsibility of supervising the professional conduct of the attorneys appearing before them, their decision should not be disturbed unless there is no reasonable basis for the determination. Kevlik v. Goldstein, 724 F.2d 844, 847 (1st Cir. 1984). *See also* Trust Corp. of Montana v. Piper Aircraft Corp., 701 F.2d 85, 87 (9th Cir. 1983); Lowder v. All-Star Mills, Inc., 300 S.E.2d 230, 234 (N.C. Ct. App. 1983). Other jurisdictions, including Maine, have embraced the “clearly erroneous” standard which is only slightly less deferential than review for abuse of discretion. Casco N. Bank v. JBI Assocs., 667 A.2d at 859. *See also* United States v. Hobson, 672 F.2d 825, 827 (11th Cir.) (stating that in criminal cases “[t]he ‘abuse of discretion’ standard is simply too deferential where such a fundamental constitutional right [to counsel] is affected”), *cert. denied*, 459 U.S. 906 (1982).

\(^{108}\) The manner in which the trial court and the Law Court went about their decision to disqualify Goldstein is more questionable than the result. The trial court recognized its responsibility under *Macdonald Page* to carry out a three-step analysis in determining whether the new representation is substantially related to the subject matter of the former representation. Casco N. Bank v. JBI Assocs., CV-93-1253, at 4 (Me. Super. Ct., Cum. Cnty., Feb. 1, 1995) (Bradford, J.). There is no indication in
B. Singer's Disqualification

The Law Court, in affirming Singer's disqualification, stated that "[t]he language of . . . [Rule] 3.4(b)(3)(i) is clear."\footnote{109} The Law Court reasoned that if Goldstein was disqualified, any lawyer affiliated with Goldstein also should be disqualified based on the presumption that the other lawyer would be privy to the confidential, privileged information received by Goldstein.\footnote{110} The "clarity" of the Law Court's interpretation of Rule 3.4(b)(3)(i), however, depends upon its reliance on an unstated assumption: namely, that an affiliation with a tainted lawyer at any time extends the taint to the affiliated lawyer. The reading of this expansive temporal element into Rule 3.4(b)(3)(i) is not mandated by the language of the Rule and has been rejected as too restrictive by a number of jurisdictions considering this question.\footnote{111}

its decision, however, that the requisite analysis was actually undertaken. In fact, just prior to concluding "that the involvement of Goldstein in the creation of the psychiatric hospital by CCSI, JBI and Associates was substantially related to the matters now pending," \textit{id.} at 5, the court merely recited Judge Weinfeld's "substantially related" test, which appears to beg the question:

Under the "substantially related" test, the former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client.

\textit{id.} The Law Court's "highly deferential" review of the trial court's conclusion, Casco N. Bank v. JBI Assoc., 667 A.2d at 859, failed to address the fact that even if the trial court had ample evidence to conclude "that the prior representation was substantially related to the pending litigation," \textit{id.} at 860, the trial court did not set out its findings under the Macdonald Page analysis.

Similarly, the fact that the trial court was "not persuaded that the right to move for disqualification ha[d] been waived." Casco N. Bank v. JBI Assoc., CV-93-1253, at 6, was approved by the Law Court despite the trial court's lack of explanation for its finding. Casco N. Bank v. JBI Assoc., 667 A.2d at 861. Again, the Law Court merely deferred to the trial court's conclusion without looking for the lower court's reasoning. \textit{id.} Consequently, there was no foundation upon which the Law Court could reasonably determine whether the trial court's decision was "clearly erroneous."

\footnote{109. Casco N. Bank v. JBI Assoc., 667 A.2d at 861.}
\footnote{110. \textit{id.} See supra notes 34-35 and accompanying text.}
\footnote{111. The general rule of imputed disqualification under the Model Rules of Professional Conduct explicitly "operates only among the lawyers currently associated in a firm." \textit{Model Rules of Professional Conduct} Rule 1.10 cmt. 6 (1994). Under the Model Rules, Singer's situation would be governed by Model Rule 1.9, Conflict of Interest: Former Client. Under Model Rule 1.9(b), Singer would be disqualified only if he actually had acquired confidential information while at Csaplar & Bok. \textit{See} Novo Terapeutisk Lab. A/S v. Baxter Travenol Lab., 607 F.2d 186, 197 (7th Cir. 1979) (en banc) ("[A] rote reliance on irrebuttable presumptions may deny the courts the flexibility needed to reach a just and sensible ruling on ethical matters."); Gas-A-Tron of Arizona v. Union Oil Co., 534 F.2d 1322, 1325 (9th Cir.) (holding presumption "was dispelled by evidence that [the lawyer] saw none of the files other than those . . . [unrelated to the pending suit] and that he heard no [related] confidences" while at the former firm), \textit{cert. denied}, 429 U.S. 861 (1976); Silver
Only by reading this expansive timing element into Rule 3.4 (b)(3)(i) could the Law Court fit Singer’s involvement in JBI Associates under the imputed disqualification rule. Indeed, under the Model Rules of Professional Conduct, Singer’s position would be considered under the rule of former client conflict of interest. If the Law Court had interpreted Rule 3.4(b)(3)(i) to have incorporated Model Rule 1.10’s introductory phrase, “while lawyers are associated in a firm,” a different analysis of Singer’s status would have been mandated. The court would have to examine whether Singer’s representation was appropriate under the general successive conflict of interest rule. This analysis would have given Singer the opportunity to rebut the presumption that he was in possession of any confidential information.

An examination of Maine Bar Rule 3.4(d)(1)(ii) illustrates the inequity of imputing Goldstein’s disqualification to Singer with no opportunity for rebuttal. Rule 3.4(d)(1)(ii) addresses a law firm’s duties when a new lawyer joins the firm. The Rule prohibits the firm from representation adverse to a former client of the new lawyer only if the representation involves the same subject matter of the previous representation or if the lawyer personally acquired material confidential information during the former employment. If Associates had hired another lawyer from Singer’s present firm, the Law Court presumably would have allowed inquiry into Singer’s actual involvement in or knowledge of Csaplar & Bok’s representation of Associates, CCSI, and JBI. To deny the identical inquiry for Singer himself by expansively reading the imputed disqualification rule is inconsistent.

The Law Court also ruled that even if Maine’s imputed disqualification rule allowed Singer the opportunity to show he possessed no confidential information, “the other reasons supporting Rule 3.4(d)(3)(i)—client’s expectations of loyalty, public perception of

Chrysler Plymouth Inc. v. Chrysler Motors Corp., 518 F.2d 751, 754 (2d Cir. 1975) ("[W]hile this Circuit has recognized that an inference may arise that an attorney formerly associated with a firm himself received confidential information transmitted by a client to the firm, that inference is a rebuttable one.").

112. Maine Bar Rule 3.4(d)(1)(ii) reads:
   (d) Conflict of Interest: Successive Representation.
   (1) Interests of Former Clients
      
      (ii) When a lawyer becomes affiliated with a firm, the firm shall not accept or continue representation adverse to a former client of the lawyer, or the lawyer's previous law firm, without that client's informed written consent, if:
         
         (A) Such representation involves the subject matter of former representation on which the lawyer personally worked; or
         (B) The lawyer personally had acquired information protected by [confidentiality rules] that is material to the new matter.

113. Id.
the legal profession, and preservation of the integrity of the judiciary—would require Singer’s disqualification.”114 The Law Court’s implicit adoption of the Model Code of Professional Responsibility’s “appearance of an impropriety” standard for attorney disqualification115 goes against the modern practice of rejecting that subjective standard for a more practical, fact-based inquiry.116 The Law Court offered no reason for denying this fact-based inquiry except to assert that “there is no room in [the] language [of Rule 3.4(b)(3)(i)] allowing Singer to rebut a presumption that he was privy to privileged, confidential information.”117 This conclusion again, however, is based on the challengeable assumption that the rule deals with lawyers affiliated at any time. A different outcome may have resulted if the rule was not read with any temporal element.118

C. Ramifications of the JBI Associates Decision

The Law Court’s decision upholding the disqualification of Singer occupies minimal space in the text of the JBI Associates opinion, but will have foreseeable and far reaching consequences. By adopting the strict interpretation of Rule 3.4(b)(3)(i) that one lawyer's knowl-


115. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1980) (“A Lawyer Should Avoid Even the Appearance of Professional Impropriety.”).

116. The Model Rules explicitly reject the “appearance of impropriety” standard. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 cmt. 5 (1994) (Under appearance of impropriety, “disqualification would become little more than a question of subjective judgment by the former client . . . [and] since ‘impropriety’ is undefined, the term ‘appearance of impropriety’ is question-begging.”). See also Waters v. Kemp, 845 F.2d 260, 265-66 (11th Cir. 1988) (“Under the Model Rules, the appearance of impropriety is not a ground for disqualifying a lawyer from representing a party to a lawsuit.”); Board of Educ. v. Nyquist, 590 F.2d 1241, 1247 (2d Cir. 1979) (“appearance of impropriety is simply too slender a reed on which to rest a disqualification order”); Fred Weber, Inc. v. Shell Oil Co., 566 F.2d 602, 609 (8th Cir. 1977) (terming appearance of impropriety an “eye of the beholder” test), cert. denied, 436 U.S. 905 (1978), overruled on jurisdictional grounds, 612 F.2d 377, 378 (8th Cir. 1980); Bieter Co. v. Blomquist, 132 F.R.D. 220, 225 n.8 (D. Minn. 1990) (rejecting the appearance of impropriety test and recognizing that the Model Rules were intended to substitute “clear concrete rules for the moralistic abstractions” of the Model Code).


118. It is possible that Singer would have been disqualified from representing Associates even if inquiry into his connection with the earlier representation was undertaken. Although Associates claimed that Singer was completely unfamiliar with Csaplar & Bok’s work for CCSI, JBI, and Associates, Casco N. Bank v. JBI Assocs., CV-93-1253, at 3 (Me. Super. Ct., Cum. Ctys., Feb. 1, 1995) (Bradford, J.), CCSI alleged that its president, Thacher, met with Singer in Goldstein’s office on more than one occasion when matters relating to CCSI and JBI were being discussed. Brief of Appellees at 28, Casco N. Bank v. JBI Assocs., 667 A.2d 856 (Me. 1995) (No. CUM-95-149). The hearing, if allowed, may have resulted in a determination that Singer was indeed privy to confidential information.
edge of a client’s affairs should be irrebuttably presumed to have been passed on to a former affiliate, the Law Court has accepted a view that will lead to a number of hardships. Although Maine avoids the “Typhoid Mary” problem, in which all of the lawyer’s prior law firm affiliations are imputed to the lawyer’s new firm, the court’s imputed disqualification rule still will restrict the options of Maine’s lawyers. As one commentator aptly described the situation:

Suppose that a young litigator, now out on his own, was briefly associated with a big firm and that the firm included among its members a specialist in corporate law who once, perhaps many years before, represented a client in some affair. The young lawyer is now asked to represent a second client against the first in a suit involving a substantially related matter. If the firm is large enough, the corporate specialist may never have been more than a name on the letterhead to the young litigator, who was his nominal affiliate. In most instances, the affiliate will not have been familiar with the corporate lawyer’s old client or with any of the details of that client’s affairs during the affiliate’s association with the firm. In this case, forbidding the young litigator’s representation of a second client in a suit against the first client is an empty gesture.

The strict imputation rule embraced by the Law Court constitutes the sort of “empty gesture” that the above commentator cautioned against. The rule needlessly restricts the scope of the lawyer’s practice for the benefit of upholding the “public perception of the legal profession,” a benefit which could be achieved more practically by allowing a hearing into the lawyer’s actual knowledge.

The strict rule adopted in *JBI Associates* also “imposes significant losses on would-be clients, including effective deprivation of their first choice of counsel.” In addition to denying clients their pri-

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119. “Typhoid Mary” situations occur when qualified lawyers are “shunned by prospective . . . employers because hiring them may result in the disqualification of an entire firm in a possibly wide range of cases.” Armstrong v. McAlpin, 625 F.2d 433, 443 (2d Cir. 1980) (en banc), vacated on other grounds, 449 U.S. 1106 (1981). Maine avoids this situation by disqualifying a lawyer’s new firm only when the lawyer has previously received confidential information material to the present matter. Me. Bar R. 3.4(d)(1)(ii). Nebraska is the only jurisdiction that has adopted the strict imputation of a lawyer’s prior affiliation to the present firm. See *State ex rel. Creighton Univ. v. Hickman*, 512 N.W.2d 374 (Neb. 1994); *State ex rel. FirsTier Bank v. Buckley*, 503 N.W.2d 838 (Neb. 1993). See also Haase, supra note 6; Andrew P. Romshok, Note, *The Nebraska “Bright Line” Rule: The Automatic Disqualification of a Law Firm Due to a New Lawyer’s or Nonlawyer’s Prior Affiliations . . . Sensible Solution or Serious Setback?*, 28 Creighton L. Rev. 213 (1994).

120. Harvard Note, supra note 6, at 1356 (footnotes omitted). See also Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 753-54 (2d Cir. 1975).

121. Casco N. Bank v. JBI Assocs., 667 A.2d at 861.

122. Harvard Note, supra note 6, at 1356.
mary choice of counsel, this rule may result in substantial losses of
time and money for clients. For example, a lawyer formerly affili-
ated with a large firm may represent a current client, Client C, in
various legal matters. If a client of the lawyer’s former firm, Client
F, subsequently sues Client C, it is conceivable that the lawyer may
commence representation without any knowledge that the opposing
party was a client of the former firm. In this case the lawyer may
complete substantial work at significant cost to Client C, yet still be
disqualified if Client F moves for disqualification based on the law-
yer’s past affiliations. Thus, through no fault of the lawyer, Client C
loses not only his counsel of choice, but suffers the time and cost of
hiring and bringing a new lawyer up to date with the case.123

While Maine’s legal community is relatively small, the increasing
number of attorneys in Maine124 and the tightening legal job market
will result in an increase in the frequency of circumstances such as
those encountered in JBI Associates. The negative consequences re-
sulting from the JBI Associates ruling were predicted by the Ameri-
can Bar Association:

[T]oday many lawyers practice in firms, . . . many to some de-
gree limit their practice to one field or another, and . . . many
move from one association to another several times in their
careers. If the concept of imputation were applied with un-
qualified rigor, the result would be radical curtailment of the
opportunity of lawyers to move from one practice setting to
another and of the opportunity of clients to change counsel.125

The cost of the Law Court’s imputed disqualification ruling in JBI
Associates does not fall only on attorneys and clients. The court’s
decision rendering many more lawyers vulnerable to imputed dis-
qualification rulings is likely to increase the number of disqualifica-
tion motions presented to the courts. Parties now will have an
incentive to find any attenuated affiliation between an opposing
party’s lawyer and their own action in order to gain the strategic
advantages of denying the opposition its first choice of counsel, de-
laying the process of litigation, and increasing the opponent’s costs.
In our litigious society, there is likely to be an increase in the
number of motions brought solely for tactical reasons, rather than
on the legitimate basis of the protection of client confidences. This
outcome has been expressly recognized by a number of courts,126

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123. See Liebman, supra note 6, at 1000 n.20.
124. See supra note 1.
125. MODEL RULES OF PROFESSIONAL RESPONSIBILITY Rule 1.9 cmt. 3 (1994).
126. Kevlik v. Goldstein, 724 F.2d 844, 848 (1st Cir. 1984); Redd v. Shell Oil Co.,
518 F.2d 311, 315 (10th Cir. 1975); In re Ferrante, 126 B.R. 642, 649 (Bankr. D. Me.
1984).
including the Law Court. The Law Court's *JBI Associates* decision, rather than discouraging abuse of disqualification motions, is an invitation to just such abuse.

**D. Recommendations**

In order to avoid the harsh consequences of the Law Court's interpretation of the imputed disqualification rule, Rule 3.4(b)(3)(i) should be revised to clarify when it applies. The revision should indicate that the rule only applies when lawyers are *currently* affiliated. This is the approach adopted by the ABA in its Model Rules of Professional Conduct. A proposed revision, with additions underlined, could be:

> Except as otherwise provided in these rules, if a lawyer is required to decline or withdraw from representation under these rules for reasons other than health, no current partner or associate, and no lawyer presently affiliated with the lawyer or the lawyer's firm, may commence or continue such representation.

This change would exempt lawyers in Singer's position from the imputed disqualification rule altogether. Client confidences then could be protected by adding the equivalent of Model Rule 1.9(b) to Maine's Conflict of Interest: Successive Representation guidelines. Model Rule 1.9(b) addresses Singer's position directly:

> A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
>
> (1) whose interests are materially adverse to that person; and
>
> (2) about whom the lawyer had acquired information protected by [confidentiality rules] that is material to the matter; unless the former client consents after consultation. 128

Adoption of this rule would require a hearing to consider the propriety of representation in a case such as Singer's. This process would protect the integrity of the judicial system while eliminating the damaging costs of the strict imputation rule of *JBI Associates*.

**V. Conclusion**

The Law Court's affirmance of the disqualification of Leonard Singer in *JBI Associates* under the rule of imputed disqualification

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127. Adam v. Macdonald Page & Co., 644 A.2d 461, 464 (Me. 1994) ("'Lawyers and litigants alike have caught on to the tactical advantage of disqualification motions, and some are not shy about using them anytime they think such a move will advance their own interests.'" (quoting ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT §§ 51-206-07 (1994))).

128. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9(b) (1994).
created a number of problems. The court, instead of analyzing Singer’s present position, stretched Maine’s imputed disqualification rule to fit a situation that the rule was not meant to cover. In doing so, the court has restricted lawyers’ ability to represent clients who desire their representation without gaining any practical benefit. The Law Court will be able to protect the interests of the judicial system, such as client confidentiality, while avoiding the harsh results of *JBI Associates* if it revises the Maine Bar Rules. The imputed disqualification rule should be amended to apply only to lawyers presently affiliated and to require a factual determination of whether a lawyer in Singer’s position is in possession of any confidential information.

*Michael J. Canavan*